In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1029

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA, PETITIONER

v.

R & M KAUFMANN, A DIVISION OF RUSS TOGS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by failing to bargain with petitioner District 65, which had been certified by the Board as the representative of a unit of the Company's sales employees. The Board rejected the Company's contention that District 65 was not sufficiently independent of the National Association of Women's and Children's Apparel Salesman, Inc. ("NAWCAS") to insure good faith representation of the employees in the bargaining unit. (Pet. App. 9a-20a, 33a-41a.) The court of appeals ruled, contrary to the Board, that the "record is replete with proof of the close relationship between NAWCAS and District 65" (Pet. App. 6a), and declined to enforce the Board's order.

2. Although the Board believes that the court of appeals should have enforced its order, it did not seek further review because, in its view, essentially only an evidentiary issue was presented. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491. However, petitioner District 65, the charging party before the Board, sought to intervene in the case in the court of appeals after judgment had been entered, for the purpose of filing a petition for rehearing (Pet. App. 21a-23a). The court of appeals denied the motion to intervene (Pet. App. 8a).

3. The threshold issue presented is whether the court of appeals properly denied the motion to intervene. For, if it did, petitioner is not a "party" and thus has no standing to seek certiorari. *Auto Workers* v. *Scofield,* 382 U.S. 205, 209; *Railroad Trainmen* v. *Baltimore & Ohio R. Co.,* 331 U.S. 519, 524.

Although a charging party before the Board has the right to intervene in enforcement or review proceedings in the courts of appeals (*Auto Workers* v. *Scofield, supra,* 382 U.S. at 217), Rule 15(d) of the Federal Rules of Appellate Procedure provides that "[a] motion for leave to intervene * * * shall be filed within 30 days of the date on which the petition for review is filed." The decision whether to allow intervention after that time is within the discretion of the court of appeals[1] in light of all the circumstances.

Since petitioner could have anticipated that the Board might not seek certiorari in the event of an adverse

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[1] See *Alleghany Corp.* v. *Kirby,* 344 F. 2d 571 (C.A. 2); *Kaplan* v. *Guardian Life Ins. Co.,* 231 F. Supp. 874, 976-877 (W.D. Mo.); 3B Moore's Fed. Prac. 24-524.

court of appeals decision, and since the grant of intervention after judgment would have required the court below to duplicate its decisional task, the court did not abuse its discretion in denying petitioner's belated motion to intervene.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MARCH 1973.